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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 426

LILLIAN WALL BAIN, *Petitioner*

v.

JOAN BAIN NICODEMUS and JAMES G. BAIN, *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

This suit to construe a will was decided by the District Court on cross-motions for summary judgment (R. 13, 15) after a hearing at which only counsel were heard. No affidavits were filed and no witnesses were called. The District Court granted petitioner's motion and denied the motion of respondents (R. 19).

Respondents appealed to the Court below (R. 20) where briefs were filed and oral argument was heard. Thereafter the Court below remanded the case to the District Court with directions to supplement the record by holding a hearing on the subject of the testator's intentions (Appx. 1a).

Pursuant to the remand, the District Court held a hearing and then returned the record to the Court below (Orig. R. 48), where both sides filed extensive written arguments. Neither side requested oral argument and the Court below held the case under advisement for many months, ultimately reversing the District Court (Appx. 10a).

The petition for certiorari was not timely filed and it should be dismissed. The order of the Court of Appeals denying rehearing was dated May 6, 1965 (Appx. 13a). Under 28 U.S.C. Sec. 2101 (c), the petition was required to be filed within ninety days which expired on August 4, 1965. The petition was not filed until August 6, 1965, and was not personally served until August 9, 1965.

The questions presented by the petition do not reveal that petitioner is contending that a *second* oral argument is guaranteed by the Fifth Amendment. Petitioner never moved for a second oral argument after remand. She filed a petition for rehearing after the final judgment and the Court of Appeals denied it, as such. Under Rule 26 (a) of the Court of Appeals a petition for rehearing is not subject to oral argument. Thus, there is no basis for the claim (Pet. 7) that the Court of Appeals *denied* an oral argument and *forced* an unwilling litigant to submit the case on brief (Pet. 8). The only case cited in the petition agrees that a timely application for oral argument is required.

The importance of the hearing pursuant to the remand is exaggerated by the petition. The District of Columbia Rule is that testamentary language is conclusive unless it would produce an irrational result or a result which obviously could not have been intended, *Warner* v. *Warner*, 99 U.S. App. D.C. 80, 86, 237 F. 2d 561, 567. In the District Court both sides moved for summary judgment and thus petitioner agreed that there was no factual controversy to be resolved. The judgment below was grounded on the testator's intention as disclosed by the testamentary language alone (Appx. 9a), and the evidence adduced at the hearing was examined only to determine whether it shows that the testator actually had a different intention. The court below concluded that the evidence wholly fails to show a different intention (Appx. 9a).

The Fifth Amendment has never been construed to guarantee a second oral argument and the questions presented by petitioner are frivolous. Oral arguments are chiefly for the benefit of the courts, and are often denied under standard practice with respect to petitions for certiorari and petitions for rehearing. Accordingly, the petition for a writ of certiorari should either be dismissed or denied.

Respectfully submitted,

J. LOUIS MONARCH
Counsel for Respondents

August, 1965.

J. Louis Monarch